

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COMMENCEMENT TERM, 1994



UNITED STATES OF AMERICA,

Petitioner,

VERSUS: H. III, IV, V and JOHN DOE, INC., I, II and III,

Respondents

ON PETIT OF CERTIORARI BY THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

TABLE FOR RESPONDENTS

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
COMMENCEMENT TERM, 1994

Parties to the Proceeding

Respondents are five individuals who were witnesses before the grand jury and three corporations whose documents were subpoenaed by the grand jury.*

* The stock of each of the three corporations as well as the stock of the parent of the only corporation that has a parent or a subsidiary is privately held.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1613

 UNITED STATES OF AMERICA,

—v.—

Petitioner,
 JOHN DOES I, II, III, IV, V and
JOHN DOES, INC., I, II and III,
Respondents.

 ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS**Statement of the Case**

In November 1981, the Agency for International Development notified the Department of Justice that sales of tallow to a foreign country "might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq.*" (Gov't Br. at 3). In March 1982, the Antitrust Division commenced a grand jury investigation; no civil investigation was begun. (J.A. at 17). The theory of the grand jury investigation was that Sherman Act jurisdiction existed for sales of drummed tallow, even though that commodity is not sold within the United States, because foreign countries sometimes use some funds appropriated for their use by Congress to pay for the commodity. (J.A. at 43).

By April 1982, many thousands of documents, including voluminous documents from John Does, Inc. I, II and III, had been subpoenaed by the grand jury. Thereafter numerous witnesses, including John Does I, II, III, IV and V, testified before the grand jury. (J.A. at 43). Although the attorneys for John Does repeatedly raised with the Antitrust Division whether the acts in issue were within the subject matter jurisdiction of the Sherman Act and questioned the merits of the case, the grand jury investigation continued until the eve of its expiration date, June 8, 1984. At that time the Antitrust Division informed respondents that the grand jury would not be asked to return any indictments. (J.A. at 43-44).

Nonetheless, the Antitrust Division apparently decided to test its novel theories of jurisdiction in a civil suit. On June 28, 1984, the attorney who had been in charge of the grand jury investigation mailed Civil Investigative Demands ("CIDs") to John Does, Inc. I, II and III. The CIDs were essentially copies of earlier grand jury subpoenas and were accompanied by a letter advising each recipient that the CID could be complied with by certifying that all documents sought had been produced to the grand jury. In response, John Does, Inc. I and II declined to execute such a certificate and advised the Antitrust Division that in the absence of a court order the use of grand jury materials, including documents produced in response to grand jury subpoenas and grand jury testimony and leads therefrom, to prepare a civil suit would violate Rule 6(e) of the Federal Rules of Criminal Procedure. John Doe, Inc. III executed the certificate specifically preserving its rights under Rule 6(e). (J.A. at 44).

No documents were produced in response to the CIDs and the Antitrust Division made no attempt to enforce the CIDs, nor did the Antitrust Division take depositions pursuant to the Antitrust Civil Process Act. Instead, the Antitrust Division simply made a unilateral decision, without authorization from the court, that it was entitled to the wholesale use of grand jury materials, including testimony of dozens of witnesses and thousands of subpoenaed documents, to initiate and litigate a

civil lawsuit, and refused to return any subpoenaed documents to their owners, even though the grand jury had expired. (J.A. at 44).

Proceedings Below

The Antitrust Division did not seek in this case a disclosure order pursuant to Rule 6(e), Fed.R.Crim.P., for the use of grand jury materials by the prosecutors who had conducted the grand jury proceedings to prepare and litigate the related civil case. Instead, on March 6, 1985, the Antitrust Division informed respondents that on November 30, 1984, it had obtained, without notice, an *ex parte* order authorizing disclosure of grand jury material to the Civil Division for the purpose of consultations between the two divisions. This order was obtained three months after the Antitrust Division first consulted with the Civil Division. (J.A. at 44). The order authorized wholesale disclosure of grand jury material to the Civil Division, even though no showing of particularized need was made. To obtain the order, the Antitrust Division had merely stated that the purpose of the disclosure was to consult with the Civil Division to ensure uniformity of litigation under the false claims acts, while conceding to the District Court that "[w]ith [broad] civil investigative powers available to the Antitrust Division, there is no reason for it to use a grand jury to gather evidence for a civil case." (J.A. at 15).

On March 12, 1985, the District Court unsealed the *ex parte* order, and the Antitrust Division informed respondents that, on March 15, 1985, it would file a civil complaint alleging violations of the Sherman Act and federal false claims acts. (J.A. at 44-45). Respondents immediately moved on March 12, 1986 in the District Court for vacatur of the *ex parte* order and for protective relief prohibiting the Government from using grand jury materials to prepare or litigate the civil case. Although the Antitrust Division conceded to the District Court that at least 90 percent of the material on which the civil case is based was grand jury material (J.A. at 45), the District Court denied all relief requested. (Pet. App. at 21a). On March 15,

1985, the Court of Appeals for the Second Circuit ordered the sealing of the complaint expected to be filed by the Antitrust Division on that date and further ordered that "[n]o party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not now privy to such information." (Pet. App. at 20a). This prohibition remains in effect.

On September 24, 1985, the Second Circuit reversed the *ex parte* Rule 6(e) order and granted the motion to enjoin the Antitrust Division from any further access to or use of the grand jury materials to litigate the civil action. Even though the complaint disclosed matters occurring before the grand jury, the Second Circuit declined to dismiss the complaint. Without finding particularized need for this disclosure, the Court simply stated that it would not dismiss the complaint because the statute of limitations on at least one of the Government's claims had run after the filing of the complaint and the complaint did not specifically quote from or name as its source grand jury materials. (Pet. App. at 17a).

Summary of Argument

I. In *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court held that, under Rule 6(e), Fed.R.Crim.P., attorneys in the Civil Division of the Justice Department can obtain access to grand jury materials for use in a civil case only pursuant to a court order upon a showing of particularized need. The *Sells* court, however, reserved the question of whether Rule 6(e) authorized the automatic "continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15. This case presents that issue and demonstrates that no such authority exists.

The Government contends that the plain language of Rule 6(e) explicitly grants to the prosecutor who conducted a grand

jury proceeding civil litigation powers to which no other civil litigant is entitled. The Government further submits that the use of grand jury materials to litigate a civil case, including use in the civil complaint of facts derived from grand jury materials, does not disclose grand jury materials when those materials are used by the prosecutor who participated in the grand jury investigation. Finally, the Government argues that the Antitrust Division merits a special exemption from Rule 6(e)'s limitations on the civil use of grand jury materials because an Antitrust Division prosecutor has no *need* to use grand jury materials to litigate a civil case, while permitting such use would save time and money. These arguments ignore (1) the plain language of the Rule, (2) the function of the grand jury, (3) the purposes of grand jury secrecy, (4) the legislative history of the Rule, (5) the holdings of this Court, (6) the facts of this case, (7) the realities of civil litigation, (8) the temptations to abuse the grand jury presented by automatic access to grand jury materials for use in civil cases, and (9) the obvious alternative to expending duplicative time and expense available by virtue of the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1311-14.

Nothing in Rule 6(e) grants a prosecutor who conducted the grand jury proceeding the power to obtain the kinds of information to which a grand jury is entitled and to which no civil litigant is entitled. Only the grand jury has been given the extraordinary powers to obtain such information. The plain language of the Rule limits these powers to the function of the grand jury to investigate criminal cases. Because these powers are essential to that function, and because secrecy is indispensable to the exercise of those powers, this Court has consistently limited the disclosure of grand jury information. The legislative history of the Rule supports this plain construction, and to create an exception for the prosecutor who conducted the grand jury proceeding would nullify prior decisions of this Court.

II. In this case the prosecutor who conducted the grand jury proceedings would not merely be using grand jury materials for some hypothetical internal "planning" purpose, as the Government pretends. The complaint itself would disclose matters occurring before the grand jury because, as the Government concedes, it is based almost exclusively on grand jury materials. The ensuing litigation would result in substantial further disclosure of grand jury materials because defendants would be entitled to obtain the factual basis of the allegations in the complaint in order to defend themselves.

III. Finally, to permit the prosecutor who conducted the grand jury proceeding to use those materials to litigate a civil case would create temptations to misuse the grand jury to obtain additional information useful only in a civil case and would increase the risk of improper disclosures of grand jury materials. These risks are unwarranted given the Antitrust Division's option of obviating duplicative discovery and disqualification by using its concededly broad pre-complaint discovery powers under the ACPA to investigate cases when, as here, it is uncertain whether criminal charges will ever be initiated.

IV. Given the Antitrust Division's broad powers under the ACPA, it concededly had no need to base its civil case on grand jury materials. Consequently, in seeking the *ex parte* District Court order authorizing disclosure of grand jury materials to the Civil Division in order to bring this civil case, the Antitrust Division wholly failed to demonstrate particularized need, and the order improperly authorized the blanket disclosure of the entire grand jury proceedings. Violation of these two principles of grand jury secrecy, consistently upheld by this Court, required reversal. In addition, respondents were entitled to notice and an opportunity to be heard because nothing was disclosed at the *ex parte* proceeding not already known to respondents and possession of respondents' property was at issue.

Argument

POINT I

A PROSECUTOR'S RIGHT TO USE GRAND JURY MATERIALS WITHOUT A COURT ORDER IS LIMITED TO HIS DUTY TO ENFORCE THE CRIMINAL LAW

A. The Plain Language and Legislative History of Rule 6(e) Demonstrate That the Rule Limits a Prosecutor's Right to Use Grand Jury Materials

Rule 6 of the Federal Rules of Criminal Procedure codifies the conduct of grand jury investigations of criminal cases and prohibits disclosure of those investigations except as provided by that Rule. The provisions of the Rule recognize that the grand jury's performance of its function requires the assistance of prosecutors and other government personnel. The Government attempts to parlay this limited role into an automatic right to continued access to those materials for other purposes even after the grand jury has expired without returning an indictment. This affirmative grant of power to the prosecutor who conducted the grand jury proceeding is supposedly found in the plain language of the Rule.

Not a single word of the plain language of Rule 6(e) grants to prosecutors the extraordinary powers claimed by the Government. To read the Rule as the Government suggests would be to confer on the prosecutor who conducted the grand jury proceeding powers to which no other civil litigant is entitled.

No other civil plaintiff has access to the totality of the thousands of pages of testimony and documents which constitute the grand jury's proceedings. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). No other civil plaintiff is entitled to automatic access to the bank records of an adversary without giving notice and an opportunity to be

heard.¹ No other civil plaintiff is entitled to automatic access to a witness's or an adversary's tax returns in a non-tax case.² No other civil plaintiff is entitled to subpoena the testimony of a witness's or of an adversary's counsel as to who pays his fees.³

No other civil plaintiff has the right to exclude a witness's counsel during the questioning of that witness so that the witness may be "questioned vigorously, maybe even brow-beaten." *Illinois v. F.E. Moran, Inc.*, 740 F.2d 533, 540 (7th Cir. 1984). No other civil plaintiff is able to question a witness knowing his prior testimony to which that witness has no access.⁴ Moreover, no other civil plaintiff has the power to use that prior secret testimony as a predicate to institute or threaten perjury charges against an adversary.

A grand jury consisting of 23 citizens is entrusted with this information and these extraordinary powers. Nothing in Rule 6(e) grants *prosecutors* such powers.

The prosecutor who conducted the grand jury proceedings does not own the records of the grand jury. As this Court held in *Sells*, a Justice Department attorney is not free to rummage through the records of a grand jury "simply by right of office." 463 U.S. at 428. "[G]rand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators. . . . Instead those documents are records of the court." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 684-85 (1958) (Whittaker, J., concurring). See *In re Illinois Petition*, 659 F.2d 800, 803 (7th Cir. 1981), *aff'd*, *Illinois v.*

¹ Cf. Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (right to notice when bank records are subpoenaed except where Government makes showing of possible criminal conduct pursuant to § 3409).

² Cf. Internal Revenue Code, 26 U.S.C. § 6103 (confidentiality of tax return information).

³ Cf. *In re Grand Jury Subpoena*, 781 F.2d 238 (2d Cir.) (*en banc*), *cert. denied*, 106 S.Ct. 1515 (1986) (grand jury may subpoena attorney to testify as to payment of his fee).

⁴ Cf. ACPA, 15 U.S.C. § 1312 (witness has a right to counsel and a right to a transcript of his testimony under the ACPA).

Abbott & Associates, Inc., 460 U.S. 557 (1983); *In re Grand Jury Investigation of Cuisinarts Inc.*, 665 F.2d 24, 31 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983). Likewise, subpoenaed documents are the records of their owners. *In re Special March 1981 Grand Jury*, 753 F.2d 575, 579-80 (7th Cir. 1985).

Not only is the Rule devoid of any affirmative grant of such powers to a prosecutor, the Rule plainly limits the prosecutor's right to use grand jury materials to his duty to enforce the criminal law. Disclosure without a court order of grand jury materials to the prosecutor conducting the grand jury proceeding is permitted only under Rule 6(e)(3)(A)(i), and disclosure under (A)(i) is permitted only "in the performance of such attorney's duty."⁵

In *Sells*, this Court analyzed whether this reference to "duty" was an implicit limitation to criminal matters, just as (A)(ii) is an explicit limitation to "duty to enforce federal criminal law." The Court concluded that "when Congress included the criminal-use limitation in the new (A)(ii), it was merely making explicit what it believed to be already implicit in the existing (A)(i) language." 463 U.S. at 435-36. This conclusion resolves the issue of whether (A)(i) grants the prosecutor who conducted the grand jury proceeding an automatic right to use grand jury materials in civil cases. It does not; prosecutors only have such a right with respect to enforcement of the criminal law.

The reason for this limitation was succinctly expressed in *Sells*:

if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of

⁵ The Government's reliance on the penultimate sentence of Rule 6(e)(2) is misplaced. That sentence—"No obligation of secrecy may be imposed on any person except in accordance with this rule"—is not an expansion of prosecutorial power, as the Government claims. It is instead a protection of witnesses *from* prosecutors who improperly tell witnesses that they cannot discuss their testimony, even with their own lawyers. See Advisory Committee Notes on Federal Rule of Criminal Procedure 6(e), 18 U.S.C. App. at 269; *United States v. Kilpatrick*, 594 F.Supp. 1324, 1335-36 (D.Colo. 1984).

their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task.

463 U.S. at 434-35.

The Court's review in *Sells* of the legislative history of the 1977 amendment also compelled the obvious conclusion that the prosecutor who conducts the grand jury proceeding has an automatic right of access to grand jury materials *only* when he is acting under the authority of the grand jury. As this Court pointed out, Acting Deputy Attorney General Richard Thornburgh, testifying on behalf of the Justice Department at the House Hearings, addressed the problem of use of grand jury materials for non-grand jury purposes:

'Now, when you begin to move beyond the parameters of that particular [criminal] investigation, we get to the point that you and I both have some trouble with. The cleanest example I can think of where a 6(e) order [i.e., a court order under what is now (C)(i)] is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.

'It would be the practice of the Department at that time to seek a 6(e) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.'

463 U.S. at 439 (emphasis in original), *quoting* H.R. Rep. No. 95-195, 95th Cong., 1st Sess. at 4 (1977).

This Court then concluded that:

The rest of the legislative history is consistent with this view that *no* disclosure of grand jury materials for civil use should be permitted without a court order. Congress' expressions of concern about civil use of grand jury materials did not distinguish in principle between such use by outside agencies and by the Department; rather, the key distinction was between disclosure for criminal use,

as to which access should be automatic, and for civil use, as to which a court order should be required.

Id. at 440 (emphasis in original). This legislative history demonstrates that the plain language of the Rule and the function of the grand jury limit a prosecutor's right of access to grand jury materials to his duty to enforce the criminal law.

B. The Expansion of the Automatic Use of Grand Jury Materials to Prosecutors to Litigate Civil Cases Would Nullify Prior Decisions of This Court Upholding Grand Jury Secrecy

If the same prosecutor who conducted the grand jury proceeding were permitted to use grand jury materials to litigate a civil case without obtaining a Rule 6(e) order, the principle of grand jury secrecy prohibiting blanket disclosure of grand jury materials uniformly upheld by this Court from *Douglas Oil to Abbott* could be nullified. First, the prosecutor might be tempted to include the substance of the full scope of the grand jury proceedings in such a complaint, in violation of this principle. (For a case that demonstrates such a use of grand jury material, see *In re Aswad v. Hynes*, 80 A.D.2d 382, 439 N.Y.S.2d 737 (3d Dep't 1981) (grand jury testimony included verbatim in pleadings filed by prosecutor litigating civil lawsuit)). Second, even if the disclosure of grand jury materials in the complaint were less than wholesale, that disclosure, together with the discovery to which the defendants would be entitled, could ultimately result in the disclosure of the full grand jury investigation. See Point II B *infra*.

The holding in *Sells*, that the Civil Division must obtain a Rule 6(e) order to use grand jury materials to litigate civil cases, could also be circumvented if the prosecutor who conducted the grand jury proceeding were permitted to use grand jury materials to litigate a civil case. A prosecutor who conducted the grand jury proceeding permitted to use those materials to write a civil complaint could and would, as occurred here, necessarily base the complaint on grand jury

information. When a complaint included enough grand jury information, the Civil Division could litigate the case based on information from the grand jury included in the complaint without obtaining a Rule 6(e) order, in violation of *Sells*.

This Court's decisions in *Douglas*, *Abbott and Sells* uniformly enforced grand jury secrecy because it is secrecy that is the most essential, even indispensable, characteristic of grand jury proceedings. See *Sells*, 463 U.S. at 424; *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d at 28. If grand jury secrecy is to be preserved in order to protect the essential functions of the grand jury, the same standards must be applied to the prosecutor who conducted the grand jury proceeding as are applied to all other civil litigants. See *In re District Attorney of Suffolk County*, 58 N.Y.2d 436, 461 N.Y.S.2d 773, 448 N.E.2d 440 (1983). In *Suffolk County*, a case less compelling than this one, the grand juries had long since expired, one of the targets had been convicted after a trial at which much of the grand jury material had been used to impeach witnesses, and the prosecutor who conducted the grand jury investigation had obtained a court order authorizing the use of the grand jury materials to prosecute a civil case. The highest court of the State of New York unanimously reversed the disclosure order, holding that the representation of the county in a civil case by the prosecutor who conducted the grand jury proceeding "accorded him no greater rights than would accrue to any other attorneys. . . ." 461 N.Y.S.2d at 777.

If, on the other hand, grand jury testimony were "routinely available for use in governmental civil litigation" by the prosecutor who conducted the grand jury proceedings, witnesses would necessarily be less willing to testify and the grand jury would be unable to perform its function of investigating criminal offenses. *Sells*, 463 U.S. at 432. Especially when, as here, a grand jury has returned no indictment, this Court should strictly apply the principles of grand jury secrecy embodied in its prior opinions.

POINT II

THE USE OF GRAND JURY MATERIALS TO LITIGATE THE CIVIL CASE WOULD DISCLOSE MATTERS OCCURRING BEFORE THE GRAND JURY

A. The Complaint Itself in This Case Would Disclose Grand Jury Materials

The Government acknowledged in its brief to the Second Circuit that "factual allegations [of the complaint], of course, are based in large part on information uncovered during the grand jury investigation, including subpoenaed documents and grand jury testimony." (Gov't Br. to Second Circuit at 44). In the face of this concession, the Government seems to argue for the first time that no disclosure of matters occurring before the grand jury takes place unless actual, physical grand jury transcripts or subpoenaed documents are disclosed. This position ignores the Government's own previous definition of matters occurring before the grand jury as well as the plain language of the Rule and every decision interpreting the Rule.

As the Second Circuit recognized in ordering the complaint in this case to be sealed, the complaint does disclose grand jury materials, and Rule 6(e) prohibits such disclosure of "matters occurring before the grand jury." "Matters occurring before the grand jury" ". . . encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal . . . the substance of testimony. . . ." *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 869 (D.C. Cir. 1981). The Antitrust Division cited in its brief this very definition of grand jury materials when it was the party objecting to disclosure of its fact memoranda to counsel for respondents. (Gov't Br. to Second Circuit at 45). If the disclosure of fact memoranda that summarize grand jury materials "would seriously have compromised grand jury secrecy" (Gov't Br. to Second Circuit at 26), a complaint that summarizes grand jury materials is equally a breach of grand jury secrecy.

Even an internal fact memorandum to the file is no less grand jury material than is an actual transcript of testimony. *In re Special February 1975 Grand Jury*, 662 F.2d 1232, 1238 (7th Cir. 1981), *aff'd*, *United States v. Baggot*, 463 U.S. 476 (1983). Similarly a summary of all or part of a case, even if prepared after the conclusion of the grand jury proceedings, is not "sufficiently divorced from the grand jury not to be subject to Rule 6(e)." *Id.* Indeed, the United States conceded in *Baggot* that summaries of testimony are governed by Rule 6(e). *Id.*

This recognition of the meaning of grand jury materials is critical because, in many instances, it is the substance of grand jury testimony that is impermissibly sought in order to save time and expense; actual verbatim transcripts are not necessarily sought. In *Baggot*, an interview summary, not testimony, was sought, and when a prosecutor leaks information to the press, it is a summary of the status of the grand jury investigation that is disclosed. Nevertheless, matters occurring before the grand jury have been improperly disclosed, regardless of whether testimony is specifically quoted. *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980).

The Government also seems to argue for the first time that so long as the grand jury is not specifically identified as the source of a prosecutor's information, a prosecutor may disclose information learned from grand jury proceedings without disclosing "matters occurring before the grand jury." This strained, narrow reading of Rule 6(e) ignores the purpose of the Rule and the purposes of grand jury secrecy. Such disclosures do all the affirmative damage identified by this Court: (1) prospective witnesses would be discouraged from voluntarily testifying, knowing that those against whom they testify would be aware of that testimony; (2) witnesses would be less likely to testify fully and frankly as they would be open to retribution as well as to inducements; (3) there would be a risk that those about to be indicted would flee or would try to influence individual grand jurors; and (4) those accused but exonerated would be held up to public ridicule. *See Douglas Oil*, 441 U.S. at 219.

B. The Litigation of a Civil Case Based on Grand Jury Materials Would Necessarily Result in Disclosure

The Government also ignores the effect of basing a civil complaint on grand jury materials in asserting that the issue here is whether a prosecutor who conducted the grand jury proceeding may make continued use of grand jury materials to litigate the civil case without obtaining a Rule 6(e) order, "so long as he does not disclose the materials to any other person." (See Gov't Br. at 13, 14, 18, 19, 20, 23). The Government pretends that no disclosure will occur because grand jury materials would be used simply for internal "planning." Ignoring the realities of civil litigation, the Government then insists that no disclosure will occur because the materials will be "reexamined" not "exposed to view" and "the act of viewing" will occur but not "exposing materials to view."⁶ (Gov't Br. at 14, 24-25).

In this case the Government conceded to the District Court that "at least 90 percent of the material on which the civil case will be based is grand jury material." (J.A. at 45). Adversarial litigation of this complaint would necessarily result in substantial disclosure of grand jury material.

For example, as in any antitrust case, respondents would serve interrogatories asking for the factual basis of specific allegations in the complaint. Such interrogatories are basic and critical in antitrust litigation and respondents would be entitled to answers, even though those answers would necessarily reveal

⁶ The Government admits that it engages in these semantic gymnastics and relies on Webster's for the meaning and purpose of Rule 6(e) out of its need to distinguish a prosecutor from a witness. According to the Government, grand jury material is not "disclosed" to a prosecutor because he knows the contents of the material, but grand jury material would be "disclosed" to a witness by the transcript of his testimony *even though* he knows its contents. (Gov't Br. at 26 n.20). The Government has wholly failed to explain the difference it is attempting to create.

grand jury information.⁷ Simply put, under the discovery rules of the Federal Rules of Civil Procedure as interpreted by this Court, litigants in complex cases, such as the antitrust case here, must be adequately informed of the accusations against them in order to defend such cases. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 177 (1979). To bar such discovery would be to create a class of cases to which the discovery rules would not apply and thereby revive the dark days of trial by ambush that the Federal Rules were specifically devised to bring to an end. No decision of this Court supports such a total abrogation of the discovery rules of the Federal Rules of Civil Procedure.⁸

⁷ Respondents herein would have compelling and particularized need for these answers. Unlike the defendants in *Procter & Gamble*, 356 U.S. at 678, who requested blanket disclosure of the entire grand jury proceedings under Rule 34, Fed.R.Civ.P., respondents herein would request specific information as to the basis of certain allegations in the complaint pursuant to Rule 33, Fed.R.Civ.P., and the answers to those interrogatories would be necessary to defend the civil case. Since the sole basis for the allegations in the complaint is the evidence presented to the grand jury, such evidence would be disclosed.

⁸ The Second Circuit was correct in noting that only the Government would have total and "exclusive access to a storehouse of relevant fact," when the Government *initiates* civil antitrust actions based on grand jury materials or on material obtained by the Government under the ACPA. 774 F.2d at 41 (Pet. App. at 15a). However, the Second Circuit was incorrect if it was assuming that the discovery rules of the Federal Rules of Civil Procedure have no application after initiation of those cases. The interrelationship of the confidentiality provisions of the ACPA and the discovery rules was thoroughly considered in *United States v. American Telephone & Telegraph Co.*, 86 F.R.D. 603, 647-48 (D.D.C. 1980). The Court reasoned that prohibiting discovery of material obtained by the Government under the ACPA would be contrary to the Federal Rules and manifestly unfair:

Although literally sustainable, this construction of the statute seems manifestly unfair when considered according to modern principles of civil procedure. Particularly would it be unfair in a proceeding such as this, where elaborate pretrial discovery and issue-formulation procedures have been designed to get all the thousands of cards on the table in advance of trial itself.

* * *

The statute plainly contemplates that CID investigations may be followed by Government civil antitrust suits, which of course, are governed by the Federal Rules of Civil Procedure.

(footnote continued)

Depositions would also create innumerable disclosure problems. Every question at a deposition asked by the prosecutor who conducted the grand jury proceeding would more likely than not be taken from grand jury materials. Yet, the Government acknowledges that it would not be able to obtain a Rule 6(e) order authorizing disclosure of all grand jury transcripts. With respect to each question, the court would have to rule whether it was based on grand jury materials before a witness's counsel could determine whether to permit the witness to answer such an apparently tainted question.

Finally, in this case if the complaint were unsealed, respondents would move under Rule 11, Fed.R.Civ.P., to strike certain specific allegations of the complaint which are not, we believe, supported by any evidence presented to the grand jury. If the prosecutor who conducted the grand jury proceeding in fact has any evidence to support those particular allegations, that grand jury material would be revealed.

This tension between Rule 6(e) and the Federal Rules of Civil Procedure which would be created by permitting the wholesale use of grand jury materials by a prosecutor to litigate a civil case should and could be simply avoided. Both the principles of secrecy underlying Rule 6(e) and the principles of mutuality and fairness underlying the discovery rules require the prohibi-

The Court concluded that the Federal Rules of Civil Procedure and the concepts of fairness and mutuality that underlie them required the termination of the government's exclusive access to the material if it is put to any more direct use than perusal. Just as a civil defendant is entitled to grand jury materials on a showing of particularized need, when the Government initiates an antitrust action based on material obtained under the ACPA, a defendant is entitled to obtain responses to appropriately specific discovery demands on a showing of use by the Government of those materials. The principles underlying the Federal Rules require such mutuality and fairness and prohibit one party from having total and "exclusive access to a storehouse of relevant fact." *Sells*, 463 U.S. at 434, quoting *Dennis v. United States*, 384 U.S. 855, 873 (1966).

tion of the wholesale use of grand jury materials to litigate civil cases.

C. Continued Access Is Disclosure

The Government is also incorrect as a matter of law in asserting that continued access by the prosecutor to grand jury materials after the grand jury has ended is not disclosure. As the Second Circuit recognized, this Court specifically held in *Sells* that continued access is disclosure under Rule 6(e). 774 F.2d 34, 40 (Pet. App. 12a-13a). In *Sells* this Court, adopting the language of the lower court, held that "[e]ach day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the *continued access* of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing *further disclosure*." 463 U.S. at 422 n.6 (emphasis added).

When the clear language of Rule 6(e) and the Government's own position on the meaning of grand jury materials are applied to the facts of this case, it is indisputable that matters occurring before the grand jury would be disclosed if this Court unsealed the complaint, permitted the use of grand jury materials to litigate this civil case, or authorized continued access to grand jury materials after the grand jury has expired.

POINT III

ANTITRUST DIVISION PROSECUTORS DO NOT MERIT A SPECIAL EXEMPTION FROM RULE 6(e) TO LITIGATE CIVIL CASES

A. The Temptation to Abuse the Grand Jury Exists for Antitrust Division Prosecutors

The Government argues that Rule 6(e) should not be applied to an Antitrust Division prosecutor who conducted a grand jury investigation because that prosecutor does not *need* to use grand jury materials to litigate civil cases and therefore the temptation to abuse the grand jury that worried the *Sells* court does not exist in the context of the Antitrust Division's enforcement of the Sherman Act. (Gov't Br. at 35-37).

However, the temptation recognized by this Court in *Sells* improperly to use the grand jury, when it has not been preceded by an ACPA investigation, to obtain evidence for civil cases applies equally to an Antitrust Division prosecutor concerned with saving time and expense. If prosecutors are

free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.

Sells, 463 U.S. at 432.

The importance of eliminating the temptation so to misuse a grand jury is particularly great since such misuse "if and when it does occur, . . . would often be very difficult to detect and prove." *Id.* Rather than delving into the "difficult" morass of litigating in each case whether the prosecutor who conducted the grand jury proceeding was "tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in a civil suit," *id.*, what is required is a

uniform rule that all litigants—regardless of their identity—obtain court orders before using grand jury materials in civil litigation. The need for such a uniform rule is particularly apparent where, as here, the prosecutor who conducted the grand jury proceedings never asked the grand jury to return any indictments. See *In re Sells* (II), 719 F.2d 985, 991 n.8 (9th Cir. 1983), citing *United States v. Pennsalt Chemicals Corp.*, 260 F.Supp. 171 (E.D.Pa. 1966)(greater likelihood of improper use of grand jury where grand jury does not return indictments).

Finally, as the Second Circuit held, the temptation to abuse the grand jury is also increased by the expansion of access to nonprosecutors as well as to prosecutors when grand jury materials are used to litigate civil cases. 774 F.2d at 41-42 (Pet. App. at 15a). Such expansion of use increases the risk of inadvertent and improper disclosures, and such disclosures are an abuse of the grand jury that threaten its continued effectiveness.

This Court has consistently limited use of grand jury materials in order to reduce the opportunities to abuse the grand jury. To reverse the course of those decisions here would rekindle those temptations.

B. The ACPA Obviates Any Problem of Duplicative Discovery or Disqualification

The Government complains that duplicative discovery and disqualification of Government attorneys will occur if the prosecutor who conducted the grand jury proceeding cannot use those materials to litigate a civil case when the grand jury has not returned an indictment.⁹ Duplication need not occur. Since 1962 the Government has had the option of using its broad Civil Investigative Demand ("CID") powers under the

⁹ It is only in cases such as this one, where no indictment is returned, that any problem of duplication of effort by civil and criminal prosecutors might occur. When an indictment has been returned, a civil complaint can be based on the contents of the indictment, a public document; when a criminal trial occurs, civil litigants have access to the facts brought out during that trial.

ACPA to conduct civil investigations when the character of the conduct at issue is unknown, and *then* with that information to decide whether a criminal investigation is warranted.

As the Second Circuit pointed out, ACPA powers "are similar in many respects to a grand jury's powers," 774 F.2d at 39 (Pet. App. at 9a), and ACPA powers are sufficient to obtain the lesser proof required to establish civil liability. Just as with a grand jury investigation, discovery under the ACPA can be obtained prior to the initiation of legal action. Discovery under the ACPA is, as the Government itself acknowledges, less expensive than grand jury investigations. (Gov't Br. at 36). The ACPA also contains secrecy provisions which protect witnesses as well as the integrity of the investigation if no civil complaint is filed.

Changing the order of investigation would also facilitate the prosecution of civil cases because, pursuant to statute, the Antitrust Division can furnish the Civil Division with information gathered under the ACPA, while the Civil Division cannot obtain access to grand jury materials without a court order pursuant to Rule 6(e).¹⁰ Moreover, the attorney who conducted the civil investigation could then conduct the grand jury investigation, if one were deemed necessary. Duplicative discovery and disqualification need not be issues.¹¹

¹⁰ Indeed, the advice sought by the Antitrust Division from the Civil Division as to the false claims statutes here could readily have been obtained, had the Antitrust Division proceeded under the ACPA instead of in the grand jury. See Point IV *infra*.

¹¹ The Government argues that affirmance of the Second Circuit in this case would necessitate restructuring the Justice Department. Even if this claim justified breaching grand jury secrecy, which it does not, the claim has paltry merit. Mechanisms are already in place that avoid unnecessary duplication in most complex cases—antitrust, securities and tax cases. Just as the ACPA can be used to avoid duplication in antitrust cases, the Securities and Exchange Commission minimizes duplication in securities cases by conducting the initial investigation civilly, and then referring cases to the Department of Justice for prosecution, if warranted. See Title 15 U.S.C. § 78u. In tax cases, neither the Department of Justice nor the Treasury Department has

(footnote continued)

Finally, because a grand jury investigation of criminal conduct carries with it much more serious repercussions and stigma than does a civil investigation, public policy supports following this order of proceeding while the character of the conduct at issue is being investigated. Indeed, the ACPA was enacted in part because "[r]esort to a grand jury . . . is a drastic method of investigation. . . ." H.R. Rep. No. 1386, reprinted in 1962 U.S. Code Cong. & Ad. News 2567, 2568. A grand jury investigation can "debase the law 'by tarring respectable citizens with the brush of crime when their deeds involve no criminality.'" *Abbott*, 460 U.S. at 571 n.26, quoting H.R. Rep. No. 1343, 94th Cong., 2d Sess. 3, 5 (1976). The issuance of grand jury subpoenas can alone destroy a business's credit, cause employees to quit and damage contractual relationships. Where, as here, jurisdiction as well as the merits of the case are questionable, prosecutors should not be encouraged to use a grand jury initially to investigate the character of the conduct.

POINT IV

THE EX PARTE ORDER PERMITTING DISCLOSURE OF GRAND JURY MATERIALS TO THE CIVIL DIVISION WAS NOT AUTHORIZED BY RULE 6(e)

A. There Was No Compelling and Particularized Need For Disclosure to the Civil Division

Because the Antitrust Division chose to use the grand jury in lieu of the ACPA to investigate this case, when the advice of the Civil Division was needed, Rule 6(e) required a showing of

been crippled by this Court's ruling in *United States v. Baggot*, 463 U.S. 476 (1983), that the Internal Revenue Service must conduct its own civil investigations because grand jury material may not be routinely turned over to IRS for tax collection purposes.

The Government's concerns about the burden of affirmance of the Second Circuit's decision on small U.S. Attorney's offices is equally misplaced. Such offices are not ordinarily called on to staff long, complex cases; these are generally staffed from Washington and consist of the kinds of cases described above. Any duplication in the typical short case handled by such offices would accordingly be minimal.

particularized need for disclosure of grand jury materials to the Civil Division. However, as the Second Circuit recognized, the fact that the Antitrust Division had an arguably valid purpose in consulting with the Civil Division to ensure uniformity of enforcement of federal false claims statutes did not demonstrate particularized need. 774 F.2d at 38 (Pet. App. at 8a), citing *Abbott*, 460 U.S. 573 (the goals of antitrust law enforcement do not satisfy the requirement of particularized need). On appeal to the Second Circuit the Antitrust Division added the argument that disclosure was permissible to avoid duplicative discovery. However, as the Second Circuit recognized, this Court has held that the saving of time and expense—even in a law enforcement context—does not demonstrate particularized need. 774 F.2d at 39 (Pet. App. at 10a), citing *Sells*, 463 U.S. at 431. In every case, an arguably valid purpose can be stated for the use of grand jury materials, and the use of grand jury materials would always save time and expense for any civil litigant.

The Supreme Court recently reaffirmed in *Sells* that disclosure pursuant to Rule 6(e)(3)(c)(i) may be made only upon a strong showing of compelling and particularized need for disclosure:

Parties seeking grand jury transcripts under Rule 6(e) must show [1] that the material they seek is needed to avoid a possible injustice in another judicial proceeding, [2] that the need for disclosure is greater than the need for continued secrecy, and [3] that their request is structured to cover only material so needed. . . .

463 U.S. at 443, quoting *Douglas Oil*, 441 U.S. at 222.

Since grand jury secrecy is an "indispensable" part of the federal constitutional system, *United States v. Johnson*, 319 U.S. 503, 513 (1943), the burden upon a party seeking to strip away its protections is a heavy one; conclusory allegations alone will not suffice. See, e.g., *Douglas Oil*, 441 U.S. 211; *In re Grand Jury Disclosure*, 550 F.Supp. 1171, 1183 (E.D. Va. 1982); *In re Grand Jury Proceedings*, 483 F.Supp. 422, 424 (E.D. Pa. 1979). Rather, what is first required is a showing that

"the usual channels of discovery have proved fruitless" and that they have been diligently pursued, through "prompt, thorough and exhaustive discovery." *Lucas v. Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984).¹²

In this case, the Antitrust Division's *ex parte* petition to the District Court admitted that "[w]ith [the] civil investigative powers available to the Antitrust Division, there is no reason for it to use a grand jury to gather evidence for a civil case." (J.A. at 15). Yet, at the same time, the Antitrust Division conceded that no genuine independent efforts were made to obtain any information through the broad channels of discovery it had available to it. In light of these concessions the Second Circuit held that extra time and effort to obtain information through civil discovery do not constitute particularized need in this case. Here, the Antitrust Division wholly failed, indeed did not attempt, to demonstrate particularized need for disclosure of grand jury materials to the Civil Division.

¹² Even prior to *Sells*, courts read Rule 6(e) to require that civil litigants make every effort to obtain information through discovery before attempting to obtain grand jury materials. See, e.g., *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 66 (3d Cir. 1982) (disclosure of grand jury transcripts for impeachment purposes premature prior to state trial, and disclosure of full transcripts too broad for impeachment purposes); *In re Disclosure of Evidence*, 650 F.2d 599, 602, *as modified*, 662 F.2d 362 (5th Cir. 1981) (disclosure as aid to state criminal investigation and allegations of public interest not sufficient particularized need).

Since *Sells*, the courts have also so held. *United States v. Fischbach and Moore, Inc.*, 776 F.2d 839 (9th Cir. 1985) (mere recitation of finding of particularized need by District Court not sufficient); *Illinois v. F.E. Moran, Inc.*, 740 F.2d at 540 (no particularized need when witnesses have not yet been deposed and it is thus too early to tell if they need memories refreshed or impeached); *United States v. Liuzzo*, 739 F.2d 541, 545 (11th Cir. 1984) (findings of complexity of case and passage of time insufficient to establish particularized need).

B. The Blanket Disclosure of Grand Jury Materials Authorized by the District Court Was Not Permitted by Law

The Antitrust Division's *ex parte* application violated yet another, and perhaps more important, tenet of grand jury secrecy. A Rule 6(e) request must be structured with sufficient detail and particularity to enable the Court to order disclosure "discretely and limitedly." *Douglas Oil*, 441 U.S. at 221, quoting *Procter & Gamble*, 356 U.S. at 682.

The Antitrust Division requested disclosure of "a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury." (J.A. at 12). No further specificity was supplied. Thus, as the Second Circuit held, the request was for disclosure of the full scope of the grand jury investigation. 774 F.2d at 39 (Pet. App. at 10a-11a). Indeed, the Government now admits that the four "fact memoranda" it disclosed to the Civil Division totalled approximately 350 pages in length. (Gov't Br. at 44 n. 38).

Such requests for blanket disclosure of the full scope of a grand jury investigation to unspecified numbers of people are improper. The Court was prevented from acting "discretely and limitedly" in response to this request, and blanket disclosure of grand jury material is not permitted by law. *Abbott*, 460 U.S. at 568.

C. An Ex Parte Proceeding Was Improper in This Case

As the Government acknowledges, courts have repeatedly held that *ex parte* proceedings in support of Rule 6(e) applications are inappropriate when the Government presents no information to the court which is not known to the persons whose rights are affected thereby. See, e.g., *In re Doe*, 537 F.Supp. 1038, 1041-42 (D.R.I. 1982), citing *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1192 (9th Cir. 1981), *aff'd*, *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983); *In re Grand Jury Matter*, 495 F.Supp. 127, 134 (E.D.

Pa. 1980); *In re Grand Jury Investigation*, 414 F.Supp. 74 (S.D.N.Y. 1976).

In this case, we have now seen the papers presented to the District Court, and they are published in the Joint Appendix. Those papers reveal nothing about the grand jury investigation not previously known to respondents. The Antitrust Division did not present its "fact memoranda" to the District Court when it appeared *ex parte*, and there is no reason to believe respondents would have obtained those fact memoranda had respondents been present.

On the other hand, if the proceeding had not been *ex parte*, respondents would have been able to demonstrate to the District Court that in *Abbott* the Supreme Court unanimously reaffirmed that (1) legitimate law enforcement goals do not establish particularized need, and (2) blanket disclosure is never authorized by law. Because the Department of Justice legal memorandum to the District Court did not even cite the unanimous decision of the Supreme Court in *Abbott*, the District Court reached its conclusion without a presentation of the applicable law.

In *Doe*, Chief Judge Pettine articulated the problems of *ex parte* proceedings presented by this case:

It is important to realize that to a large degree 'our legal institutions presuppose a preference for adversariness,' in part because adversary proceedings facilitate informed decisionmaking. Given this established tradition favoring adversary proceedings, an *ex parte* proceeding should be resorted to only when necessary to preserve grand jury secrecy. This secrecy will obviously not be threatened by giving notice and an opportunity to object to disclosure to owners of documents held by the grand jury, inasmuch as these persons are already aware of the documents' contents and the fact that such documents are being reviewed by the grand jury.

537 F.Supp. at 1042 (citations omitted).

Indeed, the Seventh Circuit recently held that such *ex parte* proceedings after the grand jury has expired are a violation of the due process clause of the Fifth Amendment:

Although Rule 6 establishes no procedure for determining whether and to whom documents or other materials in the grand jury's custody . . . should be released, we think it implicit in the rule, in the inherent character of a judicial system, and most clearly in the due process clause of the Fifth Amendment that a federal court in disposing of property in its control must follow reasonable procedures for the protection of the owner's interest. With power comes responsibility.

In re Special March 1981 Grand Jury, 753 F.2d 575, 579 (7th Cir. 1985). The Seventh Circuit concluded:

[A]t the very least the appellants have a right to be heard on the disposition of their interests so that they can try to show, as they believe they can show, that the state does not have a legal right to take even temporary custody of all the subpoenaed records.

Id. at 580.

To prevent uninformed adjudication based on a single adversary's arguments in *ex parte* proceedings and to ensure respondents' rights with respect to their property after the conclusion of a grand jury investigation, this Court should hold that *ex parte* proceedings are improper when, as here, nothing is presented to the District Court that is not known to respondents.

Conclusion

For all the foregoing reasons, (1) the use of grand jury materials by the Antitrust Division in preparing and litigating this related civil case, including any use in the civil complaint of facts derived from grand jury materials, without obtaining a disclosure order pursuant to Rule 6(e), should be

prohibited; (2) the reversal of the District Court's order permitting disclosure of grand jury materials to the Civil Division should be upheld; and (3) all documents subpoenaed by the grand jury should be returned to their owners.

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